

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-974

CHERYL A. CASEY¹

vs.

DAVID T. SWEENEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this case, the parties were divorced pursuant to a judgment of divorce nisi dated October 26, 2011, after a long-term marriage of twenty-two years. They entered a divorce agreement (agreement) that provided in relevant part for the former husband (husband) to pay the former wife (wife) \$147 per week in alimony and \$403 per week in child support for the youngest two children, who were minors at the time of the divorce.² The agreement also provided that the parties, if financially able, would pay for the children's postsecondary educational expenses, but would "not be responsible for more than 1/3 of the costs of such education at a State School (for example, UMASS)." The parts of the agreement involving the children and alimony -- the only parts relevant here -- merged

¹ Formerly known as Cheryl C. Sweeney.

² A third child was eighteen at the time of the divorce.

into the judgment. Four years later, the husband filed a complaint for modification seeking to eliminate his alimony obligations and to decrease his child support obligations on the grounds that the wife's income had increased and the parties' middle child had become emancipated. The wife filed a counterclaim, seeking an increase in alimony on the ground of the husband's increase in income, a recalculation of the child support award, a one-third contribution by the husband to the children's college expenses, and an order for the father to pay when due certain educational loans he had cosigned for one of the children.

The judge found a material change in circumstances based on the alleged emancipation of the oldest child (though the child support provisions of the agreement did not include this child, see note 2, supra), the wife's obtaining full-time employment, and her increase in income. The judge recalculated the husband's child support obligations under the Massachusetts Child Support Guidelines (2017) (guidelines), and increased the payments by seven dollars per week. At the same time, however, the judge eliminated the alimony payments altogether in reliance on G. L. c. 208, § 53 (c) (2). Section 53 was added to G. L. c. 208 as part of the Alimony Reform Act of 2011, which took effect on March 1, 2012. See St. 2011, c. 124, § 7. Section 53 provides in relevant part:

"(b) . . . Subject to subsection (c), income shall be defined as set forth in the Massachusetts child support guidelines.

"(c) When issuing an order for alimony, the court shall exclude from its income calculation:

"(1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34; and

"(2) gross income which the court has already considered for setting a child support order."

The guidelines require the use of the parties' gross income in calculating child support where the combined total is \$250,000 or less. Where the combined total is greater than \$250,000, the guidelines apply to the first \$250,000 (the distribution of which is in proportion to each party's income), and the child support obligation for the portion that exceeds \$250,000 is in the judge's discretion. Guidelines § II.C.2. The parties' combined income in this case being less than \$250,000, the judge stated in his findings that "[t]he child support order entered herewith is based on the entirety of the income of the parties. The alimony reform act does not permit the use of dollars used to compute child support to be considered for the payment of an alimony obligation during the duration of the child support obligation." He also stated in his findings that with respect to college expenses, "[a]fter the application of grants, scholarships and other forms of aid, each party should pay an equal amount of the children's college

expenses with the caveat that neither party shall be responsible for any amount which would exceed one third of the tuition of UMASS." Despite this finding, no provision concerning college expenses was included in the judgment. With regard to fees, the judge followed the recommendation of a special master, who had been appointed to oversee discovery, that the wife be responsible for seventy-five percent of the master's fees. And, because the judge concluded that the husband had essentially prevailed, he denied the wife's motion for reasonable attorney's fees. The wife now appeals.³

Discussion. No modification of alimony is permitted without a material change in circumstances. With regard to alimony, that means a change in need or ability to pay, or both. See Pierce v. Pierce, 455 Mass. 286, 296 (2009), quoting Gottsegen v. Gottsegen, 397 Mass. 617, 624 (1986) ("the statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the

³ The husband argues that we have no jurisdiction over this appeal because, he claims, the original judgment of modification from which the appeal was taken was "vacated" at the wife's request. This is incorrect. The wife merely moved to correct a clerical error in the original judgment pursuant to Mass. R. Dom. Rel. P. 60; the docket does not show that the original judgment was vacated, and the corrected judgment is captioned an "Amended Judgment of Modification." See Franchi Mgmt. Co. v. Flaherty, 93 Mass. App. Ct. 418, 421 n.13 (2017) (correction of clerical error did not affect finality of original judgment). The amended judgment of modification, dated June 1, 2018, entered on October 16, 2018, and the wife filed a notice of appeal on October 25, 2018.

supporting spouse's ability to pay"). As the wife notes, no finding was made on these points, so, she argues, a remand is required on the question whether alimony should be modified. (The husband has not appealed the increase in child support.)

The husband argues that this is irrelevant because, under G. L. c. 208, § 53 (c) (2), he has no income that can be considered for purposes of setting alimony because, in the words of the statute, "[w]hen issuing an order for alimony, the court shall exclude from its income calculation . . . gross income which the court has already considered for setting a child support order." He argues that while only a little of his income was ordered to be utilized for child support payments, it was all considered under the guidelines in setting the amount of child support ordered.

The meaning of G. L. c. 208, § 53 (c) (2), raises a very important question that has vexed commentators, and the drafters of the guidelines, since the adoption of the Alimony Reform Act. See guidelines § II, commentary A ("Since the 2012 review and report, the Massachusetts appellate courts have not issued any decisions on point, nor has there been a statutory change. The Task Force discussed this conundrum and determined that, despite the desire to provide more instruction, no changes to this section were recommended at this time. The Task Force recommended that this issue be reviewed again during the next

quadrennial review"). See also Kindregan, Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support, 46 Suffolk U. L. Rev. 13, 39 (2013) ("This provision raises serious problems of interpretation for the courts"). Alimony and child support of course serve two different purposes. If, however, the statute were read in the way the husband urges, and as the trial judge read it, in the absence of substantial assets, it would essentially eliminate alimony in the great majority of cases in which child support is warranted.

In this case, however, we need not decide the meaning of the statutory language, and express no opinion concerning it. During the pendency of this appeal, we decided Smith v. Smith, 93 Mass. App. Ct. 361 (2018), in which we concluded that "[t]he new [G. L. c. 208,] § 53[,] does not apply retroactively to a modification of the [pre-Alimony Reform Act] divorce judgment at issue." Id. at 365 n.4. Like the original divorce judgment in Smith, the October 26, 2011, divorce judgment in this case entered prior to the effective date of the Alimony Reform Act on March 1, 2012. We are bound by Smith, and therefore vacate the portion of the judgment related to alimony so that the judge may determine under the appropriate standard whether there was a material change in circumstances, and if so, whether it warrants

a modification of the alimony set out in the agreement.⁴ "In determining whether the amount of alimony should be modified based on a change of circumstances," the judge "must weigh all the statutory factors [under G. L. c. 208, § 34,] in light of the facts of the particular case," while "keep[ing] in mind that 'the statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay.'" Pierce, 455 Mass. at 286, quoting Gottsegen, 397 Mass. at 624.

In his findings of fact, the judge ordered the parties to contribute equally to the children's college expenses, with the caveat that neither party should be required to pay more than one-third the tuition of UMASS.⁵ This is at variance with the terms of the agreement, which conditioned the parties' obligations to contribute to the children's postsecondary educational expenses on their abilities to pay, and did not require their contributions to be equal. The request for

⁴ As the husband conceded at oral argument, the judge's finding that the emancipation of the parties' oldest child constituted a material change in circumstances was incorrect because that child had been emancipated prior to the original divorce judgment, and he was not considered in the original child support calculation. The husband's complaint for modification did not allege that the oldest child had been emancipated, but alleged instead that the parties' middle child had become emancipated. The judge found that the middle child had not been emancipated, and we see no error in that finding.

⁵ As previously noted, this order was not reflected in the judgment.

modification of the parties' obligations regarding educational expenses was made by the wife by means of her counterclaim; she requested that the husband be required to pay one-third of the tuition of UMASS -- she did not request modification of her own educational expense obligation (i.e., paying what she was able, up to one-third of the tuition of UMASS). The husband did not seek any modification of his obligations for educational expenses. The judge did not rule on the wife's request. The modification the judge crafted could not in any event be supported without findings, which the judge did not make, regarding the parties' needs and abilities to pay. Absent such findings, the judge's order could have the effect of requiring a party to pay more for educational expenses than he or she could afford, as counsel for the husband essentially conceded at oral argument. As such, the educational expense provision of the judge's findings was error. On remand, the judge must consider the wife's counterclaim regarding those expenses.

As to the unequal division of responsibility for payment of the master's fees, we see no error. Mass. R. Dom. Rel. P. 26 (j) provides that the parties shall share equally in special master fees and costs "unless the special master determines that a different allocation of fees and costs is appropriate." The special master ordered the wife to pay seventy-five percent of the fees (a deviation of \$1,250 from parity) based on what the

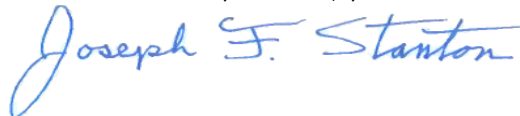
special master concluded was the wife's dilatory conduct in the discovery process. There was no error in that decision, which was adopted by the judge.⁶

Finally, since the portion of the judgment related to the wife's motion for attorney's fees was based at least in part on the elimination of alimony, it too must be vacated so that the motion may be reconsidered at the completion of the proceedings on remand.

Conclusion. The portions of the amended judgment of modification related to alimony and to the wife's motion for attorney's fees are vacated. The matter is remanded for further proceedings on these issues, and on the wife's counterclaim for educational expenses, consistent with this memorandum and order. The amended judgment of modification is otherwise affirmed.⁷

So ordered.

By the Court (Rubin, Henry &
Wendlandt, JJ.⁸),



Clerk

Entered: July 31, 2019.

⁶ The wife points to a finding by the judge that he could not assign blame to either party for the "litigious nature of this case," but this does not constitute a rejection of the special master's finding that certain delays during the discovery process were attributable to the wife.

⁷ The parties' requests for appellate attorney's fees are denied.

⁸ The panelists are listed in order of seniority.